BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

Date: March 12, 1998
Case No: 97-INA-00110

In the Matter of:

JOHN PATRICK HOME
Employer

On Behalf of:

ZOILA GIBB
Alien

Appearance: Michael J. Gurfinkel, Esq.
for the Employer and the Alien

Before: Holmes, Jarvis and Vittone
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Zoila Gibb ("Alien") filed by Employer John Patrick Home ("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, California denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment

service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On September 12, 1995, the Employer filed an application for labor certification to enable the Alien to fill the position of House Manager for its Home Care Facility for developmentally disabled persons.

The duties of the job offered were described as follows:

"Assists in administrative work of mental health care facility. Handle admissions, discharge and all related paperwork of residents. Direct and develop activities of adult mentally disabled patients. Accompany residents to doctors, nurses, and for counseling. Assist in dealing with problems, such as nutrition, cleanliness, etc."

Special requirement was: "Must be able to handle day to day problems of mentally disabled patients. Must be trained in giving CPR and First Aide." Supervises two employees and reports to the Administrator. No specific education and 2 years experience in the job or related job of Manager any industry were required. Salary was $1,442.00 per month. (AF-31-59)

On March 21, 1996 the CO issued a NOF denying certification. The CO alleged that employer may have violated 20 C.F.R. 656.21(b)(2)in that the requirement that an applicant must have First Aid and CPR is unduly restrictive. The CO explained that this requirement has not been demonstrated to be usually required in the job opportunity, and can be easily met after hiring. Documentation of the business necessity was required or readvertising. (AF-25-29)

Employer, April 22, 1996, forwarded its rebuttal, stating that "The employer did not state that the applicants 'must have First Aid and CPR'. By the words 'must be trained', the Employer was asking for training and/or a willingness to train in First Aid and CPR. The Employer did not ask for certifications in First Aid and CPR." Employer further noted that as a licensed home care facility for developmentally disabled according to California regulations training is required in first aid. (Citing Section 22, Section 80075) Thus Employer concluded that first aid and CPR courses are the industry standard under California law. (AF-17-24)

On June 26, 1996, the CO issued a Final Determination denying certification. Her reasons in the entirety are as

follows: " The Notice of Finding Dated March 21, 1996 advises the employer that he must amend his job requirements of CPR and First Aid or justify them. The employer retains the requirement of first Aid as a precondition for hire. The employer argues in his rebuttal dated April 22, 1996, that the phrase 'must be trained' is not to be interpreted as pre-conditional requirements. The NOF instructs the employer that he may retain CPR and First Aid requirements if they 'are clearly offered in the context that they must be acquired after being hired, instead of being a pre-condition to hiring'. The employer does not satisfactorily document that the requirement of First Aid is common or of a business necessity, nor that his phrase would not be interpreted as a pre-condition to hire. It is our position that First Aid Training is so readily available that one can easily obtain training after hire and should not exclude or discourage U.S. workers who may not at the time of interview, possess such certification." (Typographic errors here corrected). (AF-26-29)

On July 25, 1996, Employer filed a request for review of Final Determination. (AF-1-14)

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 88-INA-313 (1989); Belha Corp., 88-INA-24 (1989)(en banc). Failure to address a deficiency noted in the NOF supports a denial of labor certification. Reliable Mortgage Consultants, 92-INA-321 (Aug. 4, 1993).

The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for the job opportunity. Venture International Associates, Ltd., 87-INA-569 (Jan. 13, 1989)(*en banc*).

In the NOF issued on March 21, 1996, the CO proposed to deny certification on the grounds that the special job requirement of "must have first aid and CPR" appears to be unduly restrictive in violation of 656.21(b)(2)(I)(A). (AF-25-29). The rebuttal included a statement by Employer, excerpts from the California Code of Regulations pertaining to licensed care facilities, and copies from a Red Cross brochure on courses it offers in first aid and CPR (AF-17-24). Employer asserts that the application did not state "must have first aid and CPR" as the CO stated in the NOF, rather it said "must be trained in giving CPR and First Aide." Employer explained that "(b)y the words 'must be trained', the Employer was asking for **training and/or a willingness to train** in First Aid and CPR." (AF-17, emphasis added). Employer also stated that California law requires that a person in this position have training in first aid and that it included the CPR because the licensing agency prefers it and the Red Cross commonly combines the courses. The CO did not accept Employer's rebuttal and denied certification because Employer failed to

justify the requirement of CPR and first aid or to amend the application to make it clear that the requirement is not a pre-condition to hire (AF-15-16). The CO stated that "(E)mployer does not satisfactorily document that the requirement of First Aid is common or of a business necessity, nor that his phrase would not be interpreted as a pre-condition to hire." *Id*.

Employer, by its own admission, stated that the requirement of CPR and first aid training was not pre-conditional, insofar as it stated it was looking for a person "with training and/or willingness to train in First Aid and CPR" (AF-17). Also, the cited section of the California regulations do not indicate that state law requires such training prior to hire, rather it states "shall receive training". (AF-21)

We agree with the CO that the requirement is unduly restrictive and that a U.S. applicant reading the phrase "must be trained in giving CPR and First Aide" would likely interpret it to mean that, in order to be qualified for the job opportunity, the applicant must have the requisite training before hire. Thus an otherwise interested applicant without the training would be discouraged from applying. The CO was very clear in her NOF that Employer needed to either (1) establish that the requirement was usual or arose from business necessity; or (2) amend the application so that it is clear that the requirement of first aid and CPR could be obtained after hire. Employer's rebuttal does neither. Employer admits that it was seeking applicants with "training and/or willingness to train in First Aid and CPR," thus, according to Employer, training in CPR and first aid was not a pre-condition because an applicant who was willing to be trained would have satisfied the requirement, Employer's argument that the phrase "must be trained.." means something other than applicants must have training prior to hiring is unpersuasive. Further, Employer failed to meet its burden of establishing through documentation that the requirement of training in first aid and CPR is usual or arise from business necessity but merely asserted that the licensing agency prefers that staff members have such training and that it is the industry standard. See Gencorp, 87-INA-659 (Jan. 13, 1988)(*en banc*)(bare assertions that are unsupported by evidence or reason, are insufficient to carry an employer's burden of proof). Thus, because Employer failed to establish business necessity and failed to amend the application to make it clear that such a requirement could be met after hire, the CO was correct in denying certification. In that connection, although Employer stated in its request for reconsideration that Employer's rebuttal included agreement to delete the CPR requirement, we do not find that to be true. (AF-1-6)

Though not necessary to our determination, we, also, note that alien did not appear to have the general experience necessary in handling "day to day problems of mentally disabled patients." Alien's prior experience appears to be as a housekeeper at a home care facility and a "manager" for a service station.

ORDER

The Certifying Officer's denial of labor certification is AFFIRMED.

For the Panel:

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JOHN C. HOLMES
Administrative Law Judge

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